No. 75-3821

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL ENERGY ADMINISTRATION, ET AL.,
PETITIONERS

v.

ALGONQUIN SNG, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

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No.

FEDERAL ENERGY ADMINISTRATION, ET AL.,
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v.

ALGONQUIN SNG, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Energy Administration, the Secretary of the Treasury, the Administrator of the Federal Energy Administration, and the Treasurer of the United States, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-32a) and the opinion of the district court (App. C, *infra*, pp. 37a-49a) are not reported.

JURISDICTION

The judgments of the court of appeals (App. B, *infra*, pp. 33a-36a) were entered on August 11, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 232(b) of the Trade Expansion Act of 1962 authorizes the President—upon a finding that oil is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security—to adjust the imports of oil by imposing a system of license fees on such imports.

STATUTE INVOLVED

Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877, 19 U.S.C. 1862(b), as amended by Section 127(d) of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1993, provides:

> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection. If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

STATEMENT

1. Section 232(b) of the Trade Expansion Act of 1962 gives the President authority to adjust the imports of any article in the interest of national security. It provides that if, after "an appropriate investigation," the Secretary of the Treasury "finds that

[an] article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President [unless he disagrees with the Secretary's finding] shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security * * *."[1]

The substance of the provision was originally enacted as part of the Trade Agreements Extension Act of 1955, 69 Stat. 162. It was invoked by President Eisenhower in 1959 to establish the Mandatory Oil Import Program, a system of volumetric restrictions or quotas on imports of petroleum and petroleum products (Pres. Proc. 3279, 24 Fed. Reg. 1781). The program was designed to reduce this Nation's dependence on foreign oil, which the President determined was being imported in such quantities and at such low costs as to threaten to impair the national

[1] Section 232(c) of the Act enumerates some of the "relevant factors" to be considered by the Secretary and the President in determining whether imports of an article threaten to impair national security. Those factors include "domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, * * * the requirements of growth of such industries * * * including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries * * *." That Section also provides that "the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security * * *."

security by impeding the development of domestic production and refinery capacity (*ibid.*; J.A. 128-129).[2]

The Mandatory Oil Import Program did not fully achieve its objective. Domestic consumption continued to increase more rapidly than domestic production, and succeeding Presidents amended the program by increasing the import quotas to satisfy the growing domestic demand (J.A. 129).

In April 1973, President Nixon amended the program by suspending existing tariffs on oil imports and providing for "a gradual transition from the existing quota method of adjusting imports" to "a system of fees" to be paid by oil importers for licenses authorizing them to import specified amounts of petroleum and petroleum products (Pres. Proc. 4210, 38 Fed. Reg. 9645, 9646). The new program was designed to provide a long-range economic incentive to increase domestic production and refinery capacity while allowing greater levels of imports than under the prior program (J.A. 130). It established a gradually increasing schedule of license fees, which by the end of 1975 were to amount to $0.21 per barrel for crude oil and $0.63 per barrel for most petroleum products. It also established a gradually decreasing level of imports to which the license fees would not be applicable during the transition

[2] "J.A." refers to the joint appendix in the court of appeals, a copy of which we have lodged with the Clerk of this Court.

period; by 1980, license fees were to be applicable to all oil imports covered by the program.

2. On January 4, 1975, the Secretary of the Treasury initiated an investigation under Section 232 (b) to determine the current effects on the national security of imports of petroleum and petroleum products (J.A. 66). The investigation revealed that our dangerously increasing dependence on foreign petroleum posed a grave threat to the Nation's military security and economic welfare, a threat that had been underscored by the oil embargo imposed in September 1973 by the Organization of Petroleum Exporting Countries and the subsequent quadrupling of the price of imported oil (J.A. 42-43). The Secretary concluded that a sudden recurrence of an embargo or other similar interruption "would have a prompt substantial impact upon our economic well-being" and that, "in the event of a world-wide political or military crisis" resulting in "a more complete interruption of the flow of imported petroleum," the total domestic production "might well be insufficient to supply adequately a war-time economy" (J.A. 43).

The Secretary accordingly found that oil was being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security, and he recommended to the President that "appropriate action be taken to reduce imports" in order "to promote a lessened reliance upon such imports, to reduce the payments outflow and to create incentives for the use of alternative sources of energy" (J.A. 44).

On January 23, 1975, the President issued Proclamation 4341 further modifying the method of adjusting imports of crude oil and oil products (40 Fed. Reg. 3965; J.A. 35-41). The President declared that he agreed with the finding of the Secretary of the Treasury and that he "judge[d] it necessary and consistent with the national security to further discourage importation [of oil] into the United States" and to provide further incentives for increasing domestic production and refinery capacity and for developing other sources of energy (40 Fed. Reg. 3966; J.A. 36).

Recognizing that "the seriousness of the situation demanded immediate action" (J.A. 190) to reduce the Nation's dependence upon foreign oil, the President modified the existing license fee system, imposed a supplemental fee on all oil imports, and reinstated the oil tariffs that had been suspended in 1973. The proclamation increased the existing "first-tier" license fees to their maximum levels of $0.21 and $0.63 for imports in excess of the amounts that were excused from license fees under the existing program. In addition, the proclamation imposed on all imported oil, whether or not subject to the first-tier fees, a supplemental fee of $1.00 per barrel for oil entering on or after February 1, 1975, rising to $2.00 per barrel on March 1, 1975, and to $3.00 per barrel on April 1, 1975.[3]

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[3] The proclamation authorized the Administrator of the Federal Energy Administration to reduce the fee payable for imports of certain refined products by an amount increas-

The Federal Energy Administration thereafter amended its oil import regulations to implement the provisions of Proclamation 4341 (40 Fed. Reg. 4771-4776; J.A. 270-275).

3. On January 27, 1975, respondents [4] brought actions in the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the imposition of oil import license fees (J.A. 6-29, 303-315). The complaints alleged that imposition of the fees is beyond the President's constitutional and statutory authority, that proper procedures were not followed, and that no proper environmental impact statement was prepared.

On respondents' motions for a preliminary injunction, the district court ruled that Section 232(b) of the Trade Expansion Act of 1962 "is a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security"

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ing to as much as $1.80 per barrel by April 1, 1975 (40 Fed. Reg. 3968).

The scheduled increases in the supplemental fee to $2.00 and $3.00 per barrel were subsequently deferred. See Pres. Proc. 4355, 40 Fed. Reg. 10437; Pres. Proc. 4370, 40 Fed. Reg. 19421. The $2.00 fee was later made effective as of June 1, 1975. Pres. Proc. 4377, 40 Fed. Reg. 23429. The $3.00 fee has not been imposed.

[4] One set of respondents is composed of 10 utility companies that sell gas or electricity in the northeastern United States and one member of Congress. The other set is composed of nine states and the governors of eight of those states (App. A, *infra*, p. 8a).

(App. C, *infra*, p. 44a). "[T]he license fee program," the court stated, "is one of a number of possible actions covered in the non-defined phrase 'to adjust imports,'" and the program was properly instituted "for the protection of national security" (*id.* at 42a).[5]

The court also found that all the procedural steps required by Section 232(b) were followed (*id.* at 44a-45a) and that, "in view of the emergency nature of the problem and the need for prompt action" (*id.* at 47a), preparation of an environmental impact statement in advance of the proclamation was not required under the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321, *et seq.* (*id.* at 46a-47a).

Accordingly, since "plaintiffs have not made a strong showing that it is likely that they will prevail on the merits," and since "any interference by way of injunctive relief would be inconsistent with the public interest," the district court denied the motion (*id.* at 48a).[6]

4. Respondents' appeals were consolidated in the court of appeals with their petitions for review of the Federal Energy Administration's regulations,[7] in

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[5] The court noted that respondents did not challenge "the President's determination that his program is required in the interests of national security" (App. C, *infra*, p. 39a).

[6] The district court thereafter ordered that its findings, conclusions, and order would constitute its final judgment in the cases (J.A. 298).

[7] The petitions for review were filed pursuant to Section 7 (i) (2) (A) of the Federal Energy Administration Act of 1974, Pub. L. 93-275, 88 Stat. 102.

which they presented essentially the same contentions that they raised in their complaints in the district court. The court of appeals, with one judge dissenting, reversed the judgment of the district court and remanded the cases with instructions to grant appropriate relief to respondents; it also set aside the Federal Energy Administration's regulations (App. A, *infra*, pp. 1a-32a).[8]

The court of appeals reasoned that, although Section 232(b) authorizes the President, in the interest of national security, to "take such action * * * as he deems necessary to adjust the imports of [an] article," to give the statute the broad interpretation that its terms suggest "would be an anomalous departure" from "the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs" (*id.* at 12a). The court inferred from the legislative history that Congress intended, when it authorized the President to "adjust the imports of [an] article," to permit the use only of "direct controls" (*id.* at 16a), such as quotas, and to exclude the use of "indirect controls" (*id.* at 22a), such as license fees (*id.* at 27a-28a). The court therefore concluded that "the two-tier program of license fees initiated by Presidents Nixon and Ford are beyond the scope of their [Section 232(b)] authority and cannot stand" (*ibid.*).[9]

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[8] The court of appeals stayed the issuance of its mandate to and including September 15, 1975.

[9] The majority found it unnecessary to decide whether the statute, if more broadly interpreted, would be an unconstitutional delegation (App. A, *infra*, p. 28a). It also did not reach respondents' procedural challenges to the proclamation and the implementing FEA regulations (*ibid.*).

Judge Robb dissented, observing (*id.* at 30a-31a):

> The statute authorizes the President to "take such action . . . as he deems necessary to adjust . . . imports", without purporting to limit in any way the kind of action available to the President. Admittedly, quotas have a direct effect on imports, whereas license fees have an indirect effect. But both affect imports, and I cannot see how the plain and broad language of section 232(b) can be read to limit the President to the use of one or the other.

REASONS FOR GRANTING THE WRIT

1. The scope of the President's authority to take appropriate action to adjust petroleum imports in the interest of national security is a question of fundamental and urgent importance to the economic well-being of the Nation and should be resolved by this Court. By interpreting Section 232(b) as authorizing only the use of "direct" or quantitative controls, the decision of the court of appeals severely restricts the range of actions that the President may take to eliminate a threatened impairment of the national security. In the case of petroleum imports, the decision limits the President to the use of quotas, which have proved to be unsuitable and could cause artificial shortages and dislocations, and bars the imposition of license fees, which the President has de-

termined to be "necessary and consistent with the national security" (J.A. 36).

The decision thus impairs the President's capacity to take effective action, in the court of appeals' words, "to extricate this country from its increasingly dangerous dependence on foreign petroleum" (App. A, *infra*, p. 10a) and thereby to avoid a "grave crisis" implicating "nothing less than our country's economic freedom and survival" (*id.* at 28a). In this "matter of primary national importance" (*id.* at 10a; App. C, *infra*, pp. 40a-41a), review by this Court is warranted.

2. The decision of the court of appeals rests upon an incorrect analysis of congressional intent. The legislative history of Section 232(b) compels, rather than undercuts, an interpretation that gives full effect to the plain meaning of the statutory language.

As originally enacted in 1955, the statute authorized the President, upon a proper finding, to "take such action as he deems necessary to adjust the imports of [an] article to a level that will not threaten to impair the national security" (69 Stat. 166). The report of the Senate Committee on Finance emphasized that the provision was intended to give the President broad authority to "take whatever action is necessary to adjust imports" to a satisfactory level. S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). Senator Millikin, the ranking minority member of the committee and a principal author of the bill, stated on the floor that the provision authorizes the President to "use tariffs, quotas, import taxes, or

other methods of import restriction"—in short, "whatever action he deems necessary to adjust imports" (101 Cong. Rec. 5299 (1955)).[10]

After the provision was enacted and before it was reenacted in 1958, the Office of Defense Mobilization, part of the Executive Office of the President, submitted a report to the Subcommittee on Foreign

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[10] The court of appeals failed to give due weight to Senator Millikin's remarks. That Senator Millikin was a "representative of Colorado which was a major supplier of coal and petroleum" (App. A, *infra*, p. 17a) does not "blur [the] probative value" (*ibid.*) of his statement as a guide to legislative intent. It is not uncommon that a bill's author represents a state with a special interest in the legislation. While that special interest may explain the legislator's role in drafting the legislation, it does not diminish the relevance of his understanding of the bill's provisions.

Senator Millikin's understanding, moreover, was confirmed during debate by other Senators. Senator Bennett stated that the provision would put at the President's "command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry" (101 Cong. Rec. 5588 (1955)). See also 101 Cong. Rec. 5298 (1955) (remarks of Senator Barkley).

The court of appeals incorrectly stated that Senator Millikin's remarks were "inconsistent" with the other legislative history (App. A, *infra*, p. 18a). The court relied primarily upon the comment made during floor debate by Senator Byrd, chairman of the Senate Finance Committee, that the provision "simply leaves to the President the power, in his discretion, to decide whether to impose a quota or to reduce the imports" (101 Cong. Rec. 5297 (1955)). That comment does not support the court of appeals' inference that "the intended scope of the [President's] action was limited to direct controls" (App. A, *infra*, p. 16a). To the contrary, Senator Byrd's phrase—"to impose a quota *or* to reduce the imports"—reinforces Senator Millikin's more explicit description of the controls other than quotas that would be available to the President.

Trade Policy of the House Ways and Means Committee. The report stated that, while the provision "does not prescribe the specific actions which the President would be authorized to take, congressional discussion of the legislation indicated that the imposition of new or increased tariff duties or imports *and* the establishment of import quotas were authorized by the language adopted." [11] Another statement by that Office, submitted during hearings before the subcommittee, reiterated that, under the existing law, "only the President is authorized to determine that there is a threat [to the national security] and what means should be employed to meet it." [12]

Congressman Mills, then chairman of the subcommittee, stated on the floor of the House that "[t]he committee looked very carefully into the national security provisions of existing law" (104 Cong. Rec. 10542 (1958)). The committee recommended, and Congress enacted, certain procedural amendments to those provisions (see 72 Stat. 678-679). Although aware of the President's view that the existing law authorized the imposition of different types of controls to adjust imports, including tariffs as well as quotas, the committee did not recommend, and Con-

[11] *Foreign Trade Policy, Compendium of Papers on United States Foreign Trade Policy Collected by the Staff for the Subcommittee on Foreign Trade Policy of the Committee on Ways and Means*, p. 643 (1958) (emphasis added).

[12] Hearings on Foreign Trade Policy before the Subcommittee on Foreign Trade Policy of the House Committee on Ways and Means, 85th Cong., 1st Sess. 399 (December 9, 1957).

gress did not enact, any change in what Congressman Mills referred to as "the broad delegation of authority" (104 Cong. Rec. 10542 (1958)) to the President to select the means of accomplishing the necessary adjustment.

That delegation of authority was carried forward without substantive change as Section 232(b) of the Trade Expansion Act of 1962, 76 Stat. 877,[13] and

[13] Congress rejected in 1962 a provision in a different section of the bill that would have given the President authority, "when he finds it in the national interest," to establish or increase a duty on any article or to impose any other import restriction that he finds necessary (108 Cong. Rec. 19875 (1962); App. A, *infra*, pp. 19a-20a). The court of appeals inferred, from the proposal's introduction, that "Congress believed that no other provision of the Act conferred that authority," and, from the proposal's rejection, that "it did not desire to confer this authority and discretion upon the President" (*id.* at 21a). Even assuming the correctness of those inferences, neither is "devastating to the Government's position" (*ibid.*). Contrary to the court of appeals' assumption, the rejected provision would not have given the President "the same authority he claims derives implicitly from [Section 232(b)]" (*id.* at 20a). Unlike the rejected proposal, which would indeed have been an expansive delegation of authority to the President to impose import controls in the "national interest," Section 232 provides for an investigation, consultation, and recommendation to the President, requires a finding that imports threaten to impair the "national security" (in light of the considerations set forth in Section 232(c), see n. 1, *supra*), and limits any adjustment of imports under the section to what is necessary to eliminate the threat to the national security. That Congress rejected in 1962 a far broader delegation of authority over duties and other import restrictions does not mean that the terms of Section 232(b) should be read to exclude the President's use of license fees as a method of adjusting imports.

was reenacted with additional procedural and technical amendments by Section 127(d) of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1993."

The national security provision today, no less than in 1955, means just what it says. The President may take "whatever action is necessary to adjust imports" (S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955)), including the imposition of quotas, tariffs, fees, and other controls. Whether the method he selects has a "direct" or "indirect" effect on imports is immaterial under the statute.

3. The contrary observation of the court of appeals notwithstanding, this reading of Section 232(b)

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[14] In 1970, the President's Cabinet Task Force on Oil Import Control advised the President that Section 232(b) gave him authority to increase tariffs, and recommended that import quotas on oil be replaced with a system of tariff restrictions. *The Oil Import Question*, pp. 90, 131 (1970). The House thereafter passed an amendment to Section 232, designed to prohibit "any adjustment of imports * * * by the imposition or increase of duty or of any fee or charge having the effect of a duty." H.R. Rep. No. 91-1435, 91st Cong., 2d Sess. 119 (1970). The amendment was reported out of the Senate Committee on Finance (S. Rep. No. 91-1431, 91st Cong., 2d Sess. 36 (1970)), but was deleted on the floor of the Senate (116 Cong. Rec. 43625, 43646 (1970)) and was not enacted.

No such amendment was adopted at the time of the 1974 Act, although President Nixon's import license fee system was implemented in April 1973. The report of the conference committee reaffirmed that, under the provision as amended, the President may "take such action, and for such time, as he deems necessary, to adjust imports so as to prevent impairment of the national security." H.R. Conf. Rep. No. 93-1644, 93d Cong., 2d Sess. 29 (1974). See also S. Rep. No. 93-1298, 93d Cong., 2d Sess. 96-97 (1974).

does not make it "an anomalous departure" (App. A, *infra*, p. 12a) from the legislative pattern in the area of foreign trade and tariffs. For example, Section 351(a)(1) of the same Act, 19 U.S.C. 1981(a)(1), confers on the President analogous authority. Upon a finding by the Tariff Commission that an article is being imported in such increased quantities as to threaten to injure a competitive domestic industry, "the President may proclaim such increase in, or imposition of, any duty or other import restriction on the article * * * as he determines to be necessary to prevent or remedy serious injury to such industry." This so-called "escape clause," like the national security provision of Section 232(b), applies to any imported article and gives the President full authority to choose the method of accomplishing the statutory objective.[15]

Moreover, the contrast between the broad delegation of authority in Section 232(b) and the narrow delegations contained in some other statutes is not a reason for a judicial narrowing of Section 232(b). To the contrary, the contrast shows that Congress knew how to confine delegations closely when it so desired and points to the conclusion that Section 232(b) was intended to confer the authority the President exercised.

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[15] A similar "escape clause" was adopted as Sections 201 through 203 of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 2011-2018.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Aug. 11, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 75-1202

ALGONQUIN SNG, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

No. 75-1206

COMMONWEALTH OF MASSACHUSETTS AND MICHAEL S. DUKAKIS, GOVERNOR, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

Petitions for Review of an Order of the Federal Energy Administration

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No. 75-1281

COMMONWEALTH OF MASSACHUSETTS, ET AL., APPELLANTS

v.

WILLIAM E. SIMON, ET AL.
(D.C. Civil 75-0129)

No. 75-1282

ALGONQUIN SNG, INC., ET AL., APPELLANTS

v.

WILLIAM E. SIMON, ET AL.

(D.C. Civil Action 75-0130)

Appeals from the United States District Court
for the District of Columbia

Argued July 14, 1975

Decided August 11, 1975

[Judgment entered this date]

Harold B. Dondis, of the bar of the Supreme Judicial Court of Massachusetts, *pro hac vice*, by special leave of court, with whom *William R. Connole*, was on the brief for petitioners in No. 75-1202 and 75-1282. *Ernest C. Bayard, III*, also entered an appearance for all petitioners.

Francis X. Bellotti, Attorney General of Massachusetts, with whom *James S. Hostetler*, was on the brief, for petitioners in Nos. 75-1206 and 75-1282. *Albert D. Sturterant* entered an appearance for petitioners in No. 75-1281. *William R. Connole*, entered an appearance for petitioners in No. 75-1206 and 75-1281.

Irwin Goldbloom, Deputy Assistant Attorney General, with whom *Rex E. Lee*, Assistant Attorney General and *Barrie L. Goldstein*, Attorney, Department of Justice, were on the brief, for respondents.

Before: TAMM, LEVENTHAL and ROBB, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* Tamm.

Dissenting opinion filed by *Circuit Judge* Robb.

TAMM, *Circuit Judge*: In these consolidated appeals, plaintiffs-appellants Commonwealth of Massachusetts, *et al.* seek to overturn the imposition of license fees for importation of oil and petroleum products as required by certain Proclamations of President Ford and former President Nixon and as implemented through regulations adopted by the Federal Energy Administration (FEA). Appellants assert that the challenged presidential actions were beyond their claimed statutory authority under 19 U.S.C. § 1862(b) (1970) and that the Proclamation and regulations in question were promulgated without adherence to certain procedural prerequisites. We told today that the executive is without substantive authority to impose license fees of the magnitude at issue here.

I. FACTUAL BACKGROUND

The operative statute, 19 U.S.C. § 1862(b), (1970), authorizes the President to

> take such action, and for such time, as he deems necessary to adjust the imports of [an] article and its derivatives so that . . . imports [of such article] will not so threaten to impair the national security.

A. *The Eisenhower and Nixon Programs*

The program under which the challenged fees were imposed was initiated in 1959 by President Eisenhower under his section 1862(b) authority in Presidential Proclamation 3279. *See* 19 U.S.C. § 1862 note. The so-called Mandatory Oil Import Program (MOIP) was based on a determination that foreign petroleum [1] was being imported into the United States in such quantities and at such low costs as to threaten to impair national security by inhibiting the development of domestic production and refinery capacity. Proclamation 3279 required each petroleum importer to secure a license, divided the country into five districts, and established an import quota for each district. The Secretary of Interior was directed to allocate the quota among individuals with an existing refining capacity or import history. Although subsequently amended twenty-five times,[2] the MOIP quota system remained in effect from 1959 to May 1, 1973.

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[1] The term "petroleum" as used herein refers to both crude oil, unfinished oils (which encompasses a variety of refined petroleum products) and finished products.

[2] *See United States Tariff Commission, World Oil Developments and U.S. Oil Import Policies*, T.C. Publication 632 at 46-48 (1973) (hereinafter *Tariff Commission Report*). Many of these modifications, especially in the period 1970-73, were necessary to meet the gap between domestic supply and demand. As such, MOIP failed to accomplish its stated objective of reducing dependence on foreign oil. *See generally id.* at 42-70.

Proclamation 4210, effective May 1, 1973, announced by former President Nixon, inaugurated a radical change in the system. *See* 19 U.S.C.A. § 1862 annot.; 38 Fed. Reg. 10725 (1973). Under this new plan, the quota system was abolished. Instead, the issuance of import licenses was conditioned on a schedule of license fees to be phased in during the period May 1, 1973 through November 1, 1975.[3] The impact of the fee system was tempered by a provision that allowed fee-free imports up to a person's previous quota allocation; these fee-free allocations were to be phased out gradually until 1980, when license fees would be required on all imports covered under the Proclamation. Finally, Proclamation 4210 abolished the tariff on petroleum. Proc. 4210 § 16.

B. *The Ford Plan*

Section 1862(b) authorizes presidential action only after receipt of advice from the Secretary of the Treasury that an article is being imported in quantities or under circumstances as to threaten to impair the national security. The Secretary may not transmit such advice to the President under this section until he has made an appropriate investigation to determine the effects on national security, during which he must consult with the Secretaries of De-

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[3] The fees were to increase during that period from 10.5 to 21 cents/bbl for crude oil, from 52 to 63 cents/bbl for motor gasoline and from 15 to 63 cents/bbl for finished products and unfinished oils. Proc. 4210 § 3(a).

fense and Commerce and other appropriate officers.[4] Finally, the Trade Act of 1974, 88 Stat. 1978, effective January 3, 1975, amended section 1862(b) to include the provision that "[t]he Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation."

On January 4, 1975, the day after the amendment became effective, Secretary of the Treasury, William E. Simon, undertook an investigation to determine whether the current level of petroleum imports threatened national security. In a letter delegating the investigation to Assistant Secretary David R. MacDonald, Secretary Simon stated:

> In my judgment, national security interests require that the procedures requiring public notice and opportunity for public comment or hearings . . . not be followed in this case. I further find that it would be inappropriate to hold public hearings, or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation as provided by Section 232, as amended by the Trade Act of 1974.

J.A. 66.

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[4] The investigation may be commenced upon "request of the head of any department or agency, upon application of an interested party," or upon the Secretary's own motion. The Secretary must submit his recommendation for action or inaction within one year of the receipt of a request for or the start of an investigation.

Thereafter, comments were solicited from the Departments of State, Defense, Interior, Commerce and Labor, the Council of Economic Advisors, and the Federal Energy Administration.[5] On January 14, 1975, Secretary Simon reported as the result of his investigation that petroleum products were "being imported into the United States in such quantities as to threaten to impair the national security" and recommended that

> appropriate action be taken to reduce imports of crude oil, principal crude oil derivatives and products, and related products derived from natural gas and coal tar into the United States, to promote a lessened reliance upon such imports, to reduce the payments outflow and to create incentives for the use of alternative sources of energy to such imports. I understand that a Presidential Proclamation pursuant to [section 1862(b)] is being drafted by the Federal Energy Administration consistent with these recommendations.

A. 44.

On January 23, 1975, President Ford signed Proclamation No. 4341 which provided for a significant increase in the license fees initially imposed by former President Nixon. First, the fee schedule announced in 1973 was accelerated to their maximum levels of $0.21 per barrel on imported crude oil and $0.63 per

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[5] *See* 49 Fed. Reg. 4412-4465 (1975). Substantive responses were received from all departments except Labor who wrote that it could not conduct an appropriate investigation within the ten day time limit imposed by Secretary Simon.

barrel on petroleum products. Second, Proclamation 4341 imposed supplemental fees of $3 per barrel on imported crude oil and $1.30 per barrel on petroleum products. The supplemental fee on crude oil was to be instituted in three monthly dollar steps from February to April, while the petroleum products fee was to be added in March and April, 1975.[6]

On January 27, 1975, plaintiffs-appellants filed suit in district court. Plaintiffs, including eight states and their governors,[7] ten utility companies,[8] and one

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[6] Proc. 4341 did not affect the fee-free quotas under the Nixon-imposed fees, nor the schedule for their elimination. President Ford also reinstated the tariffs on petroleum products removed in 1973, but provided that they could be offset against the supplemental fees.

On February 19, 1975, Congress passed a bill imposing a 90-day moratorium upon the implementation of Proc. 4341. H.R. 1767, 94th Cong., 1st Sess. (1975). On March 4th, President Ford vetoed the bill, but suspended the imposition of the supplemental fees for two months. *See* 121 Cong. Rec. H. 1403; Proc. 4355, 40 Fed. Reg. 10437 (1975). On April 30th, he continued the suspension for an additional thirty days. Proc. 4370, 40 Fed. Reg. 19421 (1975). Finally, on June 1, 1975, President Ford imposed the second dollar of the supplemental fee. Proc. 4377, 40 Fed. Reg. 23429 (1975).

[7] Commonwealth of Massachusetts and Governor Michael S. Dukakis; State of Connecticut and Governor Ella Grasso; State of Maine and Governor James B. Longley; State of New Jersey and Governor Brendan T. Byrne; State of New York and Governor Hugh Carey; Commonwealth of Pennsylvania and Governor Milton J. Shapp; State of Rhode Island and Governor Philip W. Noel; and State of Vermont and Governor Thomas P. Salmon. The State of Minnesota subsequently intervened as a plaintiff.

[8] Algonquin SNG, Inc., New England Power Co., New Bedford Gas and Edison Light Co., Cambridge Electric Light

member of Congress,[9] asserted that the fees imposed by Presidents Nixon and Ford in Proclamations 4210 and 4341 exceeded their authority under 19 U.S.C. § 1862(b), that the Secretary of the Treasury failed to comply with the procedural requirements of that section, and that the government had failed to file a required environmental impact statement.

In a February 21st Order, the district court found jurisdiction under 28 U.S.C. §§ 1331 and 1340 and rejected the contention that the action was barred by the Tax Anti-Injunction Act, 26 U.S.C. § 7421 (1970). Although finding that appellants would suffer irreparable injury by the implementation of the program, the court refused to grant injunctive relief. The court found that the scope of presidential authority under section 1862(b) encompassed the power to impose license fees, "a regulatory measure enacted for the protection of national security." J.A. 290. The court also held that the Secretary of the Treasury had fulfilled the procedural requirements of section 1862(b) and that the failure to file an environmental impact statement was excused by an "emergency situation." J.A. 293. Final judgment was entered on March 11, 1975,[10] and this appeal fol-

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Co., Canal Electric Co., Montaup Electric Co., the Connecticut Light and Power Co., the Hartford Electric Light Co., Western Massachusetts Electric Light Co., and Holyoke Water Co.

[9] Representative Robert P. Drinan, SJ.

[10] In response [to] a motion by appellant, consented to by the government, the district court pursuant to *Fed. R. Civ. P.* 65 ordered that its conclusions, with respect to preliminary relief, constitute the court's final judgment.

lowed. On February 27, 1975, appellants also filed, pursuant to 15 U.S.C. § 766(i)(2)(A), a Petition for Review of emergency regulations promulgated by the Federal Energy Administration to implement the Ford supplemental fee program. *See* 40 Fed. Reg. 10437 (1975). In both appeals, now consolidated, appellants renew the contentions made to the district court."

II. MERITS

There is no controversy over the need for action to extricate this country from its increasingly dangerous dependence on foreign petroleum. Spending on foreign oil has increased from $2.7 billion in 1970 to about $24 billion in 1974, J.A. 187. In 1973, the United States was subjected to an oil embargo with disastrous economic consequences. As the district court stated: "The grave necessity of decreasing our dependence on foreign oil, and developing our own domestic industry and alternative sources of energy was and is a matter of primary national importance." J.A. 288-89.

Appellants do not challenge the Presidents' findings in this area but argue that the license fee program instituted by Presidents Nixon and Ford were beyond their statutory authority under section 1862(b).

[11] The one additional issue raised in the appeal of the implementing regulations is appellants' contention that the FEA violated the procedural provisions of the Federal Energy Administration Act, 15 U.S.C. §§ 761 *et seq.* In light of our conclusion that the President does not possess substantive power to impose the challenged fees, we do not reach this question.

Pointing to the statutory directive to "adjust imports", they assert that the legislative intent behind this provision was to grant authority to impose only direct import controls, such as quotas. Further, appellants rely heavily on the recent Supreme Court decisions in *National Cable Television Association, Inc.* v. *United States*, 415 U.S. 336 (1974) and *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974), arguing both that authority to impose license fees may not be implied without a clear statutory directive and that the statute should be interpreted to exclude such power to avoid constituting an unconstitutional delegation.

The Government and the President point to the statutory mandate to the President to "take such action . . . as he deems necessary" as evidencing the broad grant of authority in section 1862(b). This national security authority, they opine, encompasses both indirect and direct methods of adjusting imports, and thus would include the license fee program. The district court upheld the program, finding it

> one of a number of possible actions covered in the non-defined phrase "to adjust imports" contained in [section 1862(b)] and that the program including the fee is a regulatory measure enacted for the protection of national security. Certainly, if the term includes quotas and even a complete embargo, as plaintiffs admit, it can responsibly be interpreted to include imports subject to fees, however steep.

J.A. 290.

We must disagree and instead conclude that section 1862(b) does not authorize these fees. We reach this conclusion after studying the consistently explicit, well-defined manner in which Congress has delegated control over foreign trade and tariffs; the Government's construction of section 1862(b) would be an anomalous departure from that approach. We also find support for appellant's position in the legislative history of section 1862(b), both during its original passage in 1955 and its reenactment in 1962. Finally, recent Supreme Court pronouncements mitigate against the expansive statutory construction advanced by the Government.

A

Section 1862(b) was originally enacted in the Trade Agreements Extension Act of 1955 and is currently contained within the Trade Expansion Act of 1962. The purpose of both these bills was to assist this country's economic development through stimulation and expansion of foreign trade. *See, e.g.*, 19 U.S.C. § 1801 (1970). The statutes represent the most recent solution to a political struggle which has continued throughout our history—whether United States trade policy should be utilized to increase foreign markets or to protect domestic industry. The arena for this debate over trade policy, the "lifeblood of our nation", has been Congress, and the 1955 and 1962 Acts, along with the Trade Reform Act of 1974 all represent accomodations [*sic*] of varying interests arrayed on both sides of the issue. *See generally* Metzger *United States Foreign Trade: Past, Present, and Future*, 6 *Vill.L.Rev.* 503 (1961).

The mechanism to effectuate the policy contained in all these statutes is the reduction of barriers through reciprocal trade agreements between the United States and its trading partners. Since, naturally, Congress could not as a body conduct barrier reduction negotiations, that authority was delegated to the President within congressionally-defined limits and made subject to well-established safeguards. *See, e.g.*, 108 *Cong. Rec.* 19867 (1962) (statement of Senator Humphrey).

For example, section 201 of the 1962 Act, 19 U.S.C. § 1821 authorized the President to enter into agreements to ease restrictions which unduly burdened the foreign trade of the United States and modify existing restrictions to effectuate those agreements within specified limits.[12] Similarly, section 122 of the Trade Reform Act of 1974, 19 U.S.C. § 2132 delegates to the President power to meet balance-of-payments emergencies with duty surcharges, quotas, or both for a 150 day period. In fact, we may generalize from our examination of the myriad of trade provisions that congressional delegations have been narrow and explicit in order to effectuate well-defined goals. *See, e.g.*, 19 U.S.C. §§ 1901, 1981 (injuries to domestic injuries); *id.* §§ 2251, 2253 (import relief for threat-

[12] Congress also mandated in this connection that the Tariff Commission was to have an advisory role in the process and that President desigate an agency to conduct public hearings. 19 U.S.C. §§ 1841, 1843.

ened domestic injuries); *id.* § 1351 (modify duties within limitations of 50% of existing tariff rates under reciprocal trade agreements). *See also Consumers Union of United States, Inc.* v. *Kissinger*, 506 F.2d 136, 141-43 (D.C.Cir. 1974), *cert. denied*, —— U.S. —— (1975).

Fitted against this scheme, the Government interpretation of section 1862(b) would represent an anomalous delegation of almost unbridled discretion and authority in the tariff area. The Government has invoked this section as authorizing executive abolition of a tariff, *see* Proc. 4210, *supra*, and as conveying power to impose fees which would double the revenues collected from tariffs by the United States.[13] Moreover, the number of articles potentially covered under the umbrella of "national security" is great. Under these circumstances, such a massive assertion of executive authority in an area so thoroughly occupied by Congress requires careful scrutiny on our part to ascertain the extent of the legislative delegation.

B

The predecessor to section 1862(b) was first enacted in the Trade Agreements Extension Act of 1955, 69 Stat. 162. The problem which originally prompted the drafting of such a provision was petroleum,

[13] Proc. 4341 was expected to generate $4.8 billion in anuual revenues. In 1974 total revenues from all tariffs were $4.3 billion. *See* White House Fact Sheet at 13, J.A. 170. U.S. Customs Service, *Activity Report*, Fiscal Year 1974.

which was being imported in such amounts as to threaten domestic production. A voluntary program initiated by President Eisenhower in 1954 did not produce the desired reduction of imports.

Once the Senate turned to the problem, however, its inquiry was not confined to petroleum, nor was the eventual drafting of a generalized provision preordained. As the Senate Committee Report on the Trade Extension Act makes clear:

> The committee had before it several proposals dealing with specific commodities, namely petroleum, fluorspar, lead, and zinc. In lieu of specific action on each of these the committee adopted an amendment which specifies that the Director of the Office of Defense Mobilization shall report to the President when he has reason to believe that imports of a commodity are entering the United States in such quantities as to threaten to impair the national security; and that the President, if he finds a threat to the national security exists, shall take whatever action is necessary to adjust imports to a level that will not threaten to impair the national security.

S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). Remarks on the floor bring the history of the section into clear focus; rather than engaging in the potentially acrimonous process of selecting which commodities deserved protection under the guise of national security and establishing quotas for each, a generalized amendment was adopted. *See* 101 *Cong. Rec.* 5298 (1955) (statement of Senator Barkley); *id.* at 5297-98 (statements of Senators Flanders and

Byrd). That the intended scope of the action was limited to direct controls is brought out in a colloquy between Senator Saltonstall and Senator Byrd, the Chairman of the Committee which produced the bill:

> MR. SALTONSTALL. This is the final question I should like to address to the Senator. The problem of oil imports is taken care of in the last section of the bill. This gives the opportunity to the President to adjust imports, *under restrictive conditions or quotas*, after a report by the Director of Defense Mobilization, and after a separate independent investigation by the President if he believes the national security is being affected.
>
> MR. BYRD. That is correct, except the amendment applies to all commodities; it applies not only to oil, but to all commodities.
>
> MR. SALTONSTALL. It applies to all commodities, does it?
>
> MR. BYRD. Yes. In other words, it puts other commodities on the same basis as agricultural commodities. It simply leaves to the President the power, in his discretion, *to decide whether to impose a quota or to reduce the imports.*

Id. at 5297. (emphasis supplied).

The Government points to two statements from the same 1955 Senate floor debate as establishing that the intent behind the National Security Section was to give the President broad authority, including the power to impose license fees. Senator Bennett of Utah is quoted saying:

> As I understand the bill, the ODM will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs in order to protect a particular industry, and to meet its particular needs.

Id. at 5588. When placed in context, however, this statement offers no support for the Government's position. It was made to point out that the Senator's home-state of Utah's protection of fluorspar would be well protected and clearly was made in reference to the entire bill and other existing laws. *See, e.g.*, 50 U.S.C. §§ 98 *et seq.* (stockpiling); 19 U.S.C. §§ 1336, 1338, 1351 (tariff adjustments).

The second statement the Government offers appears more relevant. Senator Millikin, the ranking minority member of the committee which considered the bill, stated that the provision

> grants to the President authority to take whatever action he deems necessary to adjust imports if they should threaten to impair the national security. He may use tariffs, quotas, import taxes, or other methods of import restriction.

101 *Cong. Rec.* at 5299. At first blush, this passage would directly support the Government's position; several factors, however, blur its probative value. First, the statement was made in the somewhat self-serving posture of a revelation by Senator Millikin, as representative of Colorado which was a major supplier of coal and petroleum, that it "was of considerable importance . . . that this amendment provide an adequate vehicle for assistance to [such] industries . . . [and that he was] convinced that the

proposal can and will work." *Id.* Second is our normal reluctance to attach overriding weight to statements of individual legislators during floor debates. *See, e.g., United States* v. *Int'l Union of United Auto., Aircraft and Agr. Implement Workers of America*, 352 U.S. 567 (1957); *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968); *compare Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375 (D.C.Cir. 1973) (statement of *sponsors* entitled to weight). The third factor is our recognition that the Senator's statement is inconsistent with all the other legislative history recounted above.

Plaintiffs advance the Conference Report on the 1955 Act to counter any inference drawn from Senator Millikin's statement. Referring to the provision, the Conferees stated

> it is not intended to, and does not, diminish or impair any authority the President may have under other law.

Conf. Rep. No. 745, 84th Cong., 1st Sess. 6 (1955). Plaintiffs argue plausibly that for that conference statement to have content, section 1862(b) cannot grant the expansive authority that Government claims. They conclude by invoking the rule that committee reports are generally accorded greater weight than individual statements by legislators. *See, e.g., Housing Authority of City of Omaha, Neb.* v. *United States Housing Authority*, 468 F.2d 1 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *American Airlines, Inc.* v. *CAB*, 365 F.2d 939 (D.C. Cir. 1966).

We find both sides' arguments probative, neither dispositive. While recognizing that sponsors' statements must be accorded weight, *see, e.g., National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967); *City of New York* v. *Train*, 494 F.2d 1033 (D.C.Cir. 1974), *aff'd*, 420 U.S. 53 (1975); *Portland Cement Ass'n* v. *Ruckelshaus, supra*, we also recognize that the statements of Senators Millikin and Byrd point in opposite directions. In light of all factors, we must conclude that the single floor statement that Government may justifiably rely upon is a woefully slender reed to support its construction of the statute.

That conclusion is buttressed by turning to the legislative history behind the Trade Expansion Act of 1962, 76 Stat. 872, the Act of which section 1862 (b) is actually a part. The Government asserts that section 1862(b) was included in the revision *pro forma*. Govt. Br. at 15 n.2. While no mention is made in the Senate Committee Report of the section or its intended scope, *S. Rep. No.* 2059, 87th Cong., 2d Sess. (1962), we believe that the intent of this Congress is indeed relevant, especially in light of another provision considered and rejected.

The Senate Finance Committee had added to the 1962 bill a proposed section 353:

> Notwithstanding any other provision of law, the President may, when he finds it in the Na-

tional interest, proclaim with respect to any article imported into the United States—

(1) the increase of any existing duty on such article to such rate as he finds necessary,

(2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary, and

(3) the imposition of such other import restrictions as he finds necessary.

108 *Cong. Rec.* 19875 (1962). Quite simply, the proposal explicitly gave the President the same authority he claims derives implicitly from section 1862(b). Senator Holland baldly stated that section 353 "is a very great departure from anything that the Congress has ever done before by way of granting power to the Executive in the field of trade." *Id.*[14] The provision passed the Senate, but was deleted in conference. Explaining its removal, Senator Byrd, Chairman of the sponsoring Senate Finance Committee stated:

> Section 353 was a sword which would cut two ways: First, one problem was that there was no procedure prescribed for ascertaining the facts and second, the other problem was that the Congress did not retain the same opportunity

[14] Senator Holland opposed the bill. While statements of opponents normally are no authorative guide to construing the statute, *see* Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967), they may sometimes be useful, especially where proponents make no response. Arizona v. California, 373 U.S. 546 (1963). In this case, we find Senator Holland's statement relevant in light of the fact that his view eventually prevailed.

for review as the other sections of the bill provide.

Id. at 22182.

Two conclusions, equally devastating to the Government's position, can be drawn. The fact that the proposal was introduced at all yields the inference the Congress believed that no other provision of the Act conferred that authority. *See, e.g., United States* v.*Carter*, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *Fisher Flouring Mills Co.* v. *United States*, 270 F.2d 27 (9th Cir. 1958). We also must conclude that Congress' eventual rejection of the provision indicates that it did not desire to confer this authority and discretion upon the President.

This reading of the intent of the 1962 Congress, couple [*sic*] with the lack of strong evidence to the contrary concerning the 1955 Congress, mandate the conclusion that the President does not currently possess the authority to impose indirect controls. We note that recently the Customs Court reached the same conclusion regarding the legislative history behind section 1862(b). *Yoshida International, Inc.* v. *United States*, 378 F. Supp. 1155, 1166 (Cust. Ct. 1974).

We have examined the cases the Government has cited to us interpreting section 1862(b) and find that none dictate an opposite conclusion. Both *Texas American Asphalt Corp.* v. *Walker*, 177 F. Supp. 315, 326 (S.D. Tex. 1959) and *Pancoastal Petroleum, Ltd.* v. *Udall*, 348 F.2d 805 (D.C. Cir. 1965) dealt with challenges to particular quota allocations un-

der MOIP; both upheld the President's discretion in establishing the mechanism by which direct controls were to be administered. Neither provides any support for the proposition that section 1862(b) conveys power to impose indirect controls. In this regard, Judge McGowan's description of section 1862(b) in *Consumers Union of United States, Inc.* v. *Kissinger, supra*, 506 F.2d at 142 (emphasis supplied, footnote omitted), is particularly apropos:

> action shall be taken "to adjust the imports" of the article in question, *which means that the article may by regulation be excluded from entry or withdrawal from warehouse.*

Finally, we have examined the present Congress' response to the President's actions. Congress passed a bill suspending for a ninety day period the imposition of the supplemental fees, which President Ford vetoed. However, we cannot interpret this conduct, obviously meant to preserve the status quo, as acquiescence to the presidential assertion of authority. *Cf. Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464 (2d Cir.), *cert denied*, 385 U.S. 974 (1966); *Brennan* v. *Midwestern United Life Insurance Co.*, 259 F. Supp 673 (N.D. Ind. 1966). As the Committee Report makes clear:

> The Committee has been informed that a suit his been instituted to test the validity of the President's action . . . . The Committee does not intend that its action in reporting out H.R. 1767 . . . should affect in one way or another the determination in this suit . . . on the merits of issues relating to the scope of Presidential authority or the validity of any particular exercise of that authority under section 232(b) of the Trade Expansion Act of 1962 or any other provision of law.
>
> Furthermore, it is not the purpose of this Act to limit, expand or otherwise alter the authority delegated to the President under Section 232 of the Trade Expansion Act of 1962, as amended. Nor is it the purpose of this Act to confirm or ratify that the President, purportedly acting under the authority of the national security provision of Section 232 of the Trade Expansion Act, as amended, either with or without public hearings, has lawfully imposed, or may lawfully impose, monetary charges, however denominated on imports whether by Proclamation or otherwise.

S. Rep. No. 94-11, 94th Cong., 1st Sess. 7 (1975). *See also H. Rep. No.* 94-1, 94th Cong., 1st Sess. 14-15 (1975). Similarly, we do not find acquiescence in the lack of an immediate challenge to the Nixon Proclamation in light of the cushioning of its impact by the fee-free provision and the virtually immediate undercutting of the rationale behind the program before its "bite" was felt by the economic events of 1973 and 1974 [*sic*].

C

The conclusion that section 1862(b) only authorizes the President to adjust imports through direct methods does not in itself necessitate invalidation of the challenged license fee program. The President has

wide discretion in establishing the mechanism and administrative framework for controls. Within that framework, it would be logical and consistent with Congress' intent to permit the President to impose license fees of a magnitude to off-set the administrative costs of the allocation program. We must therefore inquire whether we may sustain the challenged program on that ground.

The President, in the material accompanying his 1975 State of [the] Union Address, has set forth his interpretation of the distinction between a tax, tariff, and a fee:

> All three are charges which can be used to produe revenue and all three have the effect of reducing demand. The differences lie in the source of authority to levy the change. A tax must be levied by Congress for the purpose of raising domestic revenue. A tariff is a charge against imports and must also be authorized by the Congress. *A fee is also levied on imported material but may be set for non-revenue purposes and need not be legislated.*

J.A. 213 (emphasis supplied). We cannot concur in tha. expansive assessment of the scope of a fee and in fact find it inconsistent with recent Supreme Court holdings in the area.

In *National Cable Television Association, Inc* v. *United States, supra*, the Supreme Court rejected a fee purportedly justifiable on the rationale, as the face of the relevant statute 31 U.S.C § 483a apparently authorized, that its assessment was in the pub-

lic interest. The Court distinguished between a tax, which could be imposed arbitrarily and without regard for benefits bestowed, and a fee, which "is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 366 U.S. at 340. The Court found that fees must be related to the benefits they conferred, and that allowing an agency to use a public policy mandate to go beyond this limitation "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." [15] *Id.* at 341; *accord, FPC* v. *New England Power Co., supra.*

We believe that this approach is dispositive, although the character of the "fee" is different, of the claim of the legitimacy fo charges imposed on imported petroleum under section 1862(b). We have already acknowledged that there could be an administrative "fee" to cover the costs of administration. What we have here, however, is a regulatory charge, laid down by the Executive for policy reasons, carried far from the "customary orbit" of a fee into broad domains of revenue. Indeed, the oil charges here involved are expected eventually to gen-

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[15] The Court also noted that an assessment is made heavy if the activity in question was to be discouraged and that the levy is "slight if a bounty is to be bestowed" but concluded that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341. Of course, assessing fees to discourage activity is the core of the challenged program.

erate $4.8 billion annually, more than the entire 1974 United States Customs revenue. Although a new terminology was devised by President Nixon, and continued by President Ford, we see no logical or realistic basis of disputing the Tariff Commission's comment that "the new program is substantively a duty system." [16] Similarly we find no merit in the President's 1975 statement that any charge on imports is a fee, as distinguished from a tariff, if it is "set for non-revenue purposes." From earliest days, the tariff authority given Congress by the Constitution has been understood to apply to the "protective tariff" sponsored by Alexander Hamilton, a measure focused not on obtaining tariff revenues but on the "non-revenue purpose" of protecting domestic industry against foreign competition. With some change in meaning, the oil import charge can also be termed a "protective tariff," protective of national security in conditions of enormous domestic demand, but it is a measure for imposition only by the legislature or on delegation plainly authorized by the legislature. As for the concept of an administrative fee

[16] The President has created a new mechanism for import adjustment called a license fee. The analysis, however, suggests that what Proclamation 4210 does is substitute a duty system for the quota mechanism of the Mandatory Oil Import Program, for the license fee has the incidences of a duty. The name is new and the administration has been shifted from the Department of the Treasury, (U.S.) Custom Service to the Department of the Interior. Nonetheless, the new program is substantively a duty system[.]

Tariff Commission Report at 97.

based on "benefit," that has nothing to do with the kind of charge before us.[17] The history of the kind of charge involved has much to do with Congressional intent to authorize executive modification, and we are clear that a charge for the privilege of importing is a tariff or duty that Congress has historically and steadfastly kept for its own determination, and that none of these carefully limited authorizations for executive change applies to the case at hand.

In sum, the President's expansive definition of a legitimate fee cannot be accepted. We must also conclude that the programs instituted by Presidents Nixon and Ford cannot be upheld as a proper license fee. To consider it as such would make a travesty of the term. It is, as the district court found, a "regulatory measure"—an indirect control on imports—and thus outside the scope of section 1862(b).

III. Conclusion

We think it important to describe precisely the breadth of our holding. We find that in 19 U.S.C. § 1862(b) Congress only delegated authority to the President to adjust imports to protect national security through direct mechanisms. Consequently, the two-tier program of license fees initiated by Presi-

[17] While there may be a useful concept of a fee based on "benefit" the term would be grossly distorted if stretched to this case on the ground that if there were no "benefit" the importer would not pay the charge and consummate the import, for that kind of stretch would make it applicable to all tariffs and duties.

dents Nixon and Ford are beyond the scope of their section 1862(b) authority and cannot stand.[18] By this conclusion, we do not say that Congress cannot constitutionally delegate, accompanied by an intelligible standard, such authority to the President; we merely find that they have not done so by this statute. We reach no conclusion on any delegation issue raised by the parties. Similarly, we do not reach the procedural challenges that appellants have raised to the section 1862 investigation by defendant Simon, to the imposition of the program or to the FEA regulations.

We recognize that we are overturning an honest attempt by the President to find a solution to a difficult crisis; at stake is nothing less than our country's economic freedom and survival. We also realize that the judicial branch was accused of straightjacketing the coordinate branches of Government in their attempt to alleviate the massive economic dislocation created by another grave crisis, the Great Depression. We do not believe that any such criticism would be justifiable here. The President could have moved against this problem on a unilateral basis through direct controls. Alternatively, he could have sought, as he has, additional measures from Congress.

More fundamentally, this case raises a question

[18] Similarly, Section 1862(b) would not allow a President to suspend duly enacted tariffs such as President Nixon did in Proclamation 4210. Of course, President Ford reimposed the tariffs in Proclamation 4341, and no relief is now appropriate.

about the way Government should operate when responding to crisis. Neither the term "national security" nor "emergency" is a talisman, the thaumaturgic invocation of which should, *ipso facto*, suspend the normal checks and balances on each branch of Government. Our laws were not established merely to be followed only when times are tranquil. If our system is to survive, we must respond to even the most difficult of problems in a manner consistent with the limitations placed upon the Congress, the President, and the Court by our Constitution and our laws. We believe we reaffirm that basic principle today.

The judgments appealed from in Nos. 75-1281 and 75-1282 are reversed and remanded with instructions to enter appropriate relief for appellants. The regulations challenged in Nos. 75-1202 and 75-1206 are set aside.

So ordered.

ROBB, *Circuit Judge, dissenting*: The majority concludes that what the President can do directly he cannot do indirectly. On the basis of this conclusion the majority overturns what it concedes to be "an honest attempt by the President to find a solution to a difficult crisis". Since I cannot agree that the President has exceeded his delegated authority I dissent.

As amended by the Trade Act of 1974, section 232 (b) of the Trade Extension Act of 1962, 19 U.S. C.A. § 1862(b) (Supp. 1, Feb. 1975), provides that

if the Secretary of the Treasury finds that an article of commerce is being imported into the United States so as to threaten to impair the national security he shall so advise the President, and

> the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

The majority holds that under this statute Congress delegated to the President only the authority "to adjust imports to protect national security through direct mechanisms". This means, presumably, that in the interest of national security the President can use "direct mechanisms", such as quotas, to adjust imports by placing restrictions or even a complete embargo on foreign oil imports, but he cannot achieve the same result by means of indirect mechanisms, such as import license fees. I cannot find any such distinction in the statute. The statute authorizes the President to "take such action . . . as he deems necessary to adjust . . . imports", without purporting to limit in any way the kind of action available to the President. Admittedly, quotas have a direct effect on imports, whereas license fees have an indirect effect. But both affect imports, and I cannot see how the plain and broad language of section 232(b) can be

read to limit the President to the use of one or the other.

The majority rests its holding on three grounds: (1) that the broad Presidential power exercised here is unprecedented in the history of foreign trade regulation; (2) that the legislative history of section 232 does not support the government's position; and (3) that two recent Supreme Court decisions militate against the government's position. As to the first ground: however guarded Congress may have been in the past in delegating to the President the power to regulate foreign commerce, section 232 is a plain delegation of broad power where national security interests are involved. As to the second, the legislative history of section 232 is hopelessly ambiguous and inconclusive. In my opinion the floor debates do not provide an adequate foundation for a restrictive reading of section 232. Finally, the two Supreme Court decisions cited by the majority deal with license fees charged by administrative agencies to recover costs incurred by them in carrying out their regulatory functions. Any similarity between such license fees and the license fees involved here is in name only. Here the license fees are imposed for the purpose of regulating foreign commerce and not to recover governmental expenses related to such regulation.

The majority is driven to its conclusion by its concern that "[i]f our system is to survive, we must respond to even the most difficult of problems in a manner consistent with the limitations placed upon

the Congress, the President, and the Courts by our Constitution and our laws." While I share this concern, I believe the court should not interfere in this dispute between the President and Congress. The power to regulate foreign commerce belongs to Congress, and it may delegate as much or as little as it chooses to the President. If it determines it has gone too far, Congress may withdraw the delegated power from the President. Here the delegated power is broad, and Congress has had repeated opportunities to limit it or withdraw it altogether. It has not done so, and I think this court should not do so.

As for the other issues raised by the parties, they are adequately treated in the opinion of the District Court, embodied in the court's findings of fact and conclusions of law. Since this opinion is unreported, I have set it out as an appendix to this dissent.

[Appendix omitted.]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

[Filed Aug. 11, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 75-1202

ALGONQUIN SNG, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

No. 75-1206

COMMONWEALTH OF MASSACHUSETTS AND MICHAEL S. DUKAKIS, GOVERNOR, ET AL., PETITIONERS

v.

FEDERAL ENERGY ADMINISTRATION, RESPONDENT

Petitions for Review of an Order of the Federal Energy Administration

Before: TAMM, LEVENTHAL and ROBB, Circuit Judges

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Federal Energy Adminis-

tration and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the regulations challenged in the above entitled cases are set aside, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ Hugh E. Kline/rb
HUGH E. KLINE
Clerk

Date: August 11, 1975

Opinion for the Court filed by Circuit Judge Tamm.
Dissenting opinion filed by Circuit Judge Robb.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

[Filed Aug. 11, 1975, United States Court of Appeals
for the District of Columbia Circuit,
Hugh E. Kline, Clerk]

No. 75-1281

Civil 75-0129

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM E. SIMON, ET AL.

No. 75-1282

Civil 75-0130

ALGONQUIN SNG, INC., ET AL., APPELLANTS

v.

WILLIAM E. SIMON, ET AL.

Appeals from the United States District Court
for the District of Columbia

Before: TAMM, LEVENTHAL and ROBB, Circuit Judges

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, and in accordance with the opinion of this Court filed herein this date, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these causes are reversed and these cases are remanded with instructions to enter appropriate relief for appellants.

Per Curiam
For the Court

/s/ Hugh E. Kline/rb
HUGH E. KLINE
Clerk

Date: August 11, 1975

Opinion for the Court filed by Circuit Judge Tamm.
Dissenting opinion filed by Circuit Judge Robb.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed Feb. 21, 1975, James E. Davey, Clerk]

Civil Action No. 75-0129

COMMONWEALTH OF MASSACHUSETTS *et al.*, PLAINTIFFS

v.

WILLIAM E. SIMON *et al.*, DEFENDANTS

Civil Action No. 75-0130

ALGONQUIN SNG, INC. *et al.*, PLAINTIFFS

v.

WILLIAM E. SIMON *et al.*, DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The two consolidated cases were brought by several northeastern states and their governors and several utilities against the Secretary of the Treasury and the Administrator of the Federal Energy Administration. In addition, the State of Minnesota has been granted leave to intervene. These suits challenge on various statutory and constitutional grounds Proclamation No. 4341 issued by the President on

January 23, 1975. This Proclamation, among other things, imposes a supplemental [1] license fee on the importation of oil and certain petroleum products into the United States.

The thrust of the two complaints rests on several underpinnings:

(1) The Proclamation 4341 issued by the President pursuant to Section 232(b) of the Trade Expansion Act, 19 U.S.C. § 1862(b) is an unconstitutional delegation by Congress of legislative power;

(2) The statutory provisions relied upon, even if constitutional, do not give the authority to enact this particular program or plan;

(3) In taking the action he did, pursuant to Section 232(b) the President did not meet the procedural requirements set forth in the statute; and

(4) The program is being implemented without compliance with the requirements of National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* in that an EIS should have been prepared before action was taken.

There are other subsidiary grounds but the ones just recited appear to be the more important.

The case has come before the Court on plaintiffs' motions for a preliminary injunction which would restrain defendants from imposing the requirement of an import license subject to the payment of a fee as provided for in Proclamation 4341.

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[1] The fee is supplemental because it is imposed in addition to certain license fees provided by Presidential Proclamation 4210 issued by President Nixon on April 18, 1973.

Secondly [*sic*], defendants oppose the granting of the relief sought on the grounds that plaintiffs cannot meet the criteria for granting a preliminary injunction. More specifically, defendants contend that the relief sought is barred by the Anti-Injunction Act, 26 U.S.C. 7421, that the President's action is in accord with constitutional and statutory requirements and that the public interest would be seriously affected by even a brief delay in the implementation of the President's program. So much for a brief description of the contentions of the parties and the present posture of the litigation.

Memoranda of points and authorities of great length together with hundreds of pages of supporting affidavits, have been filed in support of the respective positions as well as two supplemental submissions requested by the Court on the possible issue that this controversy is a "political question" which the doctrine of separation of powers as well as prudence and good sense would cause us to avoid. These, in addition to the arguments of counsel, have been most helpful.

Since plaintiffs have conceded that the President's determination that his program is required in the interests of national security is a finding which is not subject to judicial review, it appears that objection to our jurisdiction on "political question" grounds have been obviated and that the case is ready for disposition.

By way of a brief summary of the historical background, it is common knowledge that foreign oil

importations have been a serious problem for many years. In 1959, President Eisenhower in Proclamation 3729 set up a Mandatory Oil Import Program which established a system of oil import quotas, the reason being that foreign oil was being imported in such large quantities and at such low prices as to threaten the development of the domestic petroleum industry. The use of quotas was continued with several amendments from time to time, when President Nixon issued Proclamation 4210 on April 18, 1973, which eliminated the quota restrictions on oil imports, permitted importations up to the previous quota on a fee free basis, and substituted a fee system for all importations in excess of old quota levels. Because of rapidly increasing domestic demand for oil, U.S. domestic production was not keeping pace; greater levels of imports but at a slightly higher cost were permitted under this Proclamation.

The basic seriousness of this problem became indelibly underlined as a result of the embargo of last winter which caused a sharp drop in our gross national product, threw a half-million persons out of work, increased the cost of foreign oil from $3 billion in 1970 to $24 billion in 1974, thereby contributing to our unfavorable balance of trade and triggering the price inflation which, along with rising unemploymen, is perhaps the most important problem facing the leadership of this country. The grave necessity of decreasing our dependence on foreign oil, and developing our own domestic industry and alternative sources of energy was and is a matter of primary national

importance. This set of conditions provides the background for the President's action in issuing Proclamation 4341 on January 23, 1975. He acted in response to a report submitted to him on January 14, 1975 by Secretary Simon. In this report purportedly made pursuant to Section 232 of the Trade Expansion Act of 1962, as amended, and resulting from an investigation under that section, the Secretary found in substance that foreign oil was being imported into the U.S. in such quantities and under such circumstances as to threaten to impair the national security. On the basis of this finding, the Secretary recommended to the President "that appropriate action be taken to reduce imports." The President, accepting the Secretary's report, finding and recommendation, issued the Proclamation. It is stated to be an important part of the President's energy program, consisting of several elements, which admittedly will increase energy costs over the whole country. The New England states will be hardest hit because oil supplies 86% of the energy needs of that region as contrasted with 46% for the country as a whole. The affidavits on behalf on the several states confirm the particularly serious impact which the measure will have on them.

In acting as he did, the President took action "to *adjust the imports* of such article and its derivatives so that such imports will not so thereaten to impair the national security." 19 U.S.C. § 1862(b) The license fee system was the device he used.

It is necessary to identify as best we can the precise category into which this program falls. If it is a tariff or duty as plaintiffs might, but expressly do not, contend, jurisdiction to hear this case would lie in the Customs Court under 28 U.S.C § 1582. The Customs Court could provide no relief because it lacks equity jurisdiction and these suits see [*sic*] injunctive relief. If it is a tax, the delegation of which power by Congress is improper, the plaintiffs are met with the Anti-Injunction Act which, except for certain limited exceptions, is a bar to suits for the purpose of restraining the assessment or collection of a tax. 26 U.S.C § 7421(a).

It is our judgment that the license fee program is one of a number of possible actions covered in the non-defined phrase "to adjust imports" contained in Section 232(b) and that the program including the fee is a regulatory measure enacted for the protection of national security. Certainly, if the term includes quotas and even a complete embargo, as plaintiffs admit, it can responsibly be interpreted to include imports subject to fees, however steep. The statements of Senator Milliken and Bennett, the former quoted in both memoranda, indicate that the President was given a broad panoply of powers in Section 232. As such, we believe our jurisdiction to decide the validity of the fee is predicated on 28 U.S.C. §§ 1331 or 1340.

Passing to the specific objections, plaintiffs contend at the outset that Section 232 is an undue delegation of legislative authority. A corrollary to this

argument is that the delegation lacks adequate standards, and, if unheld, would confer unbridled discretion on the President. We have heard and been impressed with Mr. Connole's argument that delegations of power by the Congress to the President to adjust tariffs have always been accompanied by rather strict limitations and conditions. However, we disagree with his conclusion that this delegation particularly is defective. The non-delegation doctrine is almost a complete failure. As Professor Davis has put it:

> "Lawyers who try to win cases by arguing that delegations are unconstitutional almost invariably do more harm than good to their clients' interests." Davis—*Administrative Law Treatise*, Vol. 1, § 2.01 p. 75 (1958).

The vaguest of standards have been held adequate and various delegations without any standards have been upheld. *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *Arizona* v. *California*, 378 U.S. 546 (1963). *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495 (1935), the only two cases in American history holding invalid congressional delegations of authority, are now 40 years old and have been consistently undermined. Furthemore, Section 232 provides certain standards, even though general and somewhat imprecise. The President can only act when imports "threaten to impair the national security" and the section sets forth in detail a number of factors which the President must consider when acting

pursuant to Section 232. In the tariff analogy previously referred to, it is not there required that a prior determination of the actual impairment to the national security be made before the President exercised the tariff powers delegated to him. Accordingly, we hold that Section 232 is a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security.

Next, plaintiffs charge that, even if a valid delegation of authority, the President in promulgating Proclamation 4341 did not meet the procedural requirements of the statute. The procedural conditions set forth in Section 232(b) consist of five separate steps:

(1) The Secretary of the Treasury must undertake an appropriate investigation. While the chronological time was only 10 days (January 4 to January 14, 1975), it must be recalled that since January, 1973, this particular individual, Mr. Simon, had been living with this problem and was deeply involved in the formulation of oil import policy, first as chairman of the Oil Import Policy Committee, then as Administrator of the Federal Energy Commission, and finally as Secretary of the Treasury.

(2) In addition to appointing David Macdonald, Assistant Secretary of the Treasury for Enforcement, Operations and Tariff, to conduct the investigation, consultation was held with numerous high officials of departments and agencies to determine the effects on

national security. Extensive affidavits from these gentlemen are a part of the record.

(3) Secretary Simon on January 14, 1975, made a report of his findings and recommendation for action within one year after beginning his investigation. Having concluded that the continued level of importations threatened to impair the national security,

(4) he advised the President,

(5) who agreed with the Secretary's findings and recommendation, and took the action he deemed necessary to adjust imports "so that such imports will not so threaten to impair the national security."

It is perfectly true, as Mr. Bellotti has noted, the relative speed of this entire process may auger against its thoroughness and completeness. However, this ignores the fact that the problem of our dependence on foreign oil has been with us for months and years, has been extensively debated in and out of government, and that the President's finding of national security implications was but a restatement of what all knowledgable people knew to be the fact.

It is also recognized that the statute by recent amendment provides for the holding of a public hearing "if it is appropriate." The Secretary in his discretion decided it was not appropriate to hold public hearings and, in view of the importance of prompt action in what the President, in effect, found to be an emergency, we will not question his exercise of discretion. There is no constitutional or statutory right to a hearing. The procedural steps in our judgment were all taken.

Finally, plaintiffs allege that defendants violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* by failing to prepare an EIS before implementing the Proclamation.

Defendants concede their duty to comply with Section 102(2)(c) of NEPA, but argue that the Act does not, under all circumstances, require an environmental impact statement before the implementation of the government action. Defendant argues that when, as here, the government action is in response to an emergency or for reasons of national security, strict compliance with the procedural requirements of NEPA is not mandated. This is especially true, defendants argue, when the initial environmental assessment discloses no short term environmental impact. Defendants therefore maintain that, for the present, the abbreviated environmental report issued January 21, 1975, will suffice. An environmental impact statement will be published May 15.

The case law is clear that NEPA must be complied with to the fullest extent possible, unless there is a clear conflict with a statutory duty or some other impediment that makes full compliance excusable. If defendants can show that drafting an impact statement will prevent its performance in meeting an emergency situation, then it will be excused from strict compliance. *Calvert Cliffs' Coordinating Committee* v. *A.E.C.*, 449 F.2d 1109 (D.D.C. 1971).

Defendants' reasons for not complying with NEPA involve considerations of national security. When he issued the Proclamation on January 23, the President stated: "Whereas, I find and declare that adjustments must be made in imports of crude oil . . . so that such imports will not so threaten to impair the national security." The President went on to state: "Whereas, I judge it necessary and consistent with the national security to further discourage importation . . ."

In addition, as the affidavits of Mr. Woodcock, Associate Assistant Administrator of FEA for Environmental Programs, and Russell Peterson, Chairman of Council on Environmental Quality, show (1) the filing of a preliminary report analyzing the potential short and long term environmental imports of the revised oil import program. This was made public the day Proclamation 4341 was issued. And (2) the commencement of a full EIS to be filed on May 15, 1975.

Under all the circumstances, we conclude that full compliance with the EIS requirements of NEPA will take place in the near future and that to have delayed issuance of the President's Proclamation until an EIS has been filed would not have been justified in view of the emergency nature of the problem and the need for prompt action.

Finally, turning to the relief requested, namely a preliminary injunction, it is recognized that our jurisdiction to grant equitable relief is limited and is subject to certain criteria. They are:

(1) A strong showing by petitioner that it is likely to prevail on the merits;

(2) Irreparable injury;

(3) Possibility of harm to other interested in the proceedings;

(4) The public interest.

The Court has at all times recognized the irreparable injury to plaintiffs, both the states and the private utility companies. The record is silent on possible injury to others interested in this proceeding and we will therefore assume that there is no such injury or possibility which should otherwise militate against the grant of injunctive relief.

However, it is our judgment that plaintiffs have not made a strong showing that it is likely that they will prevail on the merits. Further, we must accept the President's determination of national security upon which his action was predicated. Certainly, our continued dependence on imports of foreign oil threatens our national security, the economy, the posture of our defense and the conduct of our foreign affairs. We cannot predict or pass upon the effectiveness of the Presidential program. We must accept it as it is and hold that any interference by way of injunctive relief would be inconsistent with the public interest.

Accordingly, it is by the Court this 21st day of February, 1975,

ORDERED, that plaintiffs' motions for preliminary injunctions be and they are hereby denied.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of FRCP.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

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